IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1610

JAMES ALLAN ALMAND,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE UNITED STATES COURT OF APPEALS:

The Petitioner, James Allan Almand, respectfully prays a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered on January 9, 1978, rehearing and rehearing en banc denied on March 13, 1978.

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit affirmed with opinion Petitioner's conviction on

January 9, 1978, in case number 77-5064. (See Appendix No. 1). A Petition for rehearing and rehearing en banc was denied in this cause on March 13, 1978. (See Appendix No. 2)

TIME EXTENDED TO FILE PETITION FOR WRIT OF CERTIORARI

Justice Lewis F. Powell, Jr., extended Petitioner's time to file his Petition for a Writ of Certiorari until May 12, 1978. (See Order No. A-838) (See Appendix No. 3).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Sec. 1254 and Rule 19(1)(b), United States Supreme Court Rules.

QUESTIONS PRESENTED

I.

WAS THE INITIAL INTERROGATION OF PETITIONER UNCONSTITUTIONAL UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BECAUSE IT WAS NOT BASED ON EITHER PROBABLE CAUSE OR A REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

II.

DID THE TRIAL COURT ERR IN REFUSING TO SUPPRESS THE MARIJUANA EVIDENCE

BECAUSE THE INITIAL INTERROGATION WAS UNCONSTITUTIONAL AND TAINTED THE SUBSEQUENT SEARCH OF THE CAMPER IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Constitution, Amendment IV: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. U.S. Constitution Amendment XIV: "* * * nor shall any State deprive any person of life, liberty, property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Glen Parott testified: He was a Border Patrol agent for sixteen (16) years, anti-smuggling agent at Marfa, Texas since 1970 (Motion S.F. 8-9). He described how the sensor detectors worked (M.S.F. 9-10). The sensors involved on the road used in this case are sensors number 300, 301, 303, 311, 313, 317, 319, 321 (M.S.F. 11-14). Computer readouts show sensors activated January 22, 1976 at time period 5:20 a.m. through 6:33 a.m. The last sensor activated was sensor number 317

(M.S.F. 14-15). He gave a description of the area in which these sensors are found (M.S.F. 20). Two hundred eighty-eight (288) illegal aliens were apprehended on Highway 118 and 385 in Brewster County by the Alpine Border Patrol between the dates of September 1 and December 31, 1975 (M.S.F. 27). The sensors can tell the difference between large transport-type trucks and small cars (M.S.F. 28-29). Highway 170 which travels through Big Bend National Park and exits at Highway 385 (the stretch of roadway involved in this case) is frequently traveled by thousands of tourists and it is not unusual for people camping out and the local ranchers to be up and about early in the morning (M.S.F. 34-35). Anyone who travels Highway 170, enters Big Bend National Park, and exits on Highway 385 at five or six in the morning is suspicious if they have activated sensors 300 and 301 (M.S.F. 39). Sensors 300 and 301 are approximately six and a half or seven miles from the Rio Grande River (M.S.F. 39). There are many more vehicles stopped that are not carrying contraband and are not carrying illegal aliens than vehicles that are (M.S.F. 44).

Chester Wilson testified: He was with the Border Patrol for twenty-one (21) years and was supervisor of the Alpine Border Patrol station (M.S.F. 44). He got a call at 6:00 a.m. that a car was coming north of Panther Junction toward Highway 385 (M.S.F. 46). He was not interested in that (M.S.F. 47). The 6:00 a.m. call was for sensor 311 and 313 (M.S.F. 49). Sensor 317 was activated at 6:30 a.m. or 6:35 a.m. (M.S.F. 49). Sensor 319 had not been activated (M.S.F. 50). He was at his home and decided to investigate and picked up Officer Smith

and they headed toward the place where the sensors had been activated (M.S.F. 47-49). His plan was to drive to an area approximately five (5) miles south of Marathon, Texas and "observe whatever vehicle was coming up" (M.S.F. 50-51). He came upon the Appellant's camper parked on the east side of the highway, it had Georgia license plates on it (M.S.F. 55). He believed this was the vehicle that had activated the sensors (M.S.F. 56). The camper was parked in the opposite direction it had been heading (M.S.F. 91). He felt the front grill of the camper and it was warm (M.S.F. 56). He could not see inside of the camper (M.S.F. 56). He knocked three or four times on the camper at approximately 7:00 a.m. and got no response, the temperature was about 22° (M.S.F. 57). They were waiting around the camper about five minutes to see if anyone was there (M.S.F. 57). Another vehicle came by so they went over to talk to its occupant (M.S.F. 57). They went back to the camper and as they approached the rear, the Appellant stepped out (M.S.F. 58). He was not able to see inside the camper at that time (M.S.F. 59). He identified themselves as United States Border Patrolmen, questioned him as to his place of birth, where he was coming from, where he was going and how long he had been there, small talk about the chilly weather and sunrise (M.S.F. 59). They talked with Almand about five (5) minutes (M.S.F. 60). He asked Petitioner if he would mind if they looked inside the camper. The Appellant said "no" (M.S.F. 16). Appellant reached in his pocket, got out the key and unlocked the camper door (M.S.F. 60-61). He looked in the camper and saw gas cans, plastic yard-type container, large mound in the middle of the camper with the blanket or bedspread thrown over it. He saw large

black plastic bags the kind that one normally buys in a store. He felt the bags and pierced the plastic. He smelled the odor of marijuana and it looked like marijuana (M.S.F. 61-62). They arrested and handcuffed him for possession of marijuana. Appellant told him there were five hundred fifty (550) pounds of marijuana (M.S.F. 62). In driving from his house in Alpine to where the camper of Petitioner was parked, he was traveling in excess of 100 miles an hour because he believed the camper was loaded with illegal aliens and wanted to stop it before it got to a town (M.S.F. 72). He stated that he believed the camper was filled with illegal aliens because the radio operator told him that the camper had come off of Highway 170 around by Stude Butte all the way through the Big Bend Park and then up north and up Highway 385 (M.S.F. 72). The camper was parked four or five miles north of the entrance to Big Bend National Park (M.S.F. 73). It was approximately 54 miles from the southern entrance of the Big Bend Park to the northern exit where the camper was parked (M.S.F. 54). It is approximately 64 miles from sensor 300 to sensor 317 where the camper stopped (M.S.F. 78). He has jurisdiction in the Big Bend Park area to enforce immigration laws (M.S.F. 81). His area of responsibility is Brewster County (M.S.F. 87). He believed that the camper was the suspect vehicle because sensor 317 had been activated but sensors 319 and 321 had not been. He believed that the suspect vehicle had therefore stopped (M.S.F. 87). He stated that the only reason the camper was suspicious was because of the sensor activation reports he had received (M.S.F. 88). It was not unusual to see out-of-state license tags in the area (M.S.F. 96). He again described his knocking on the backdoor of

the camper (M.S.F. 107-109). Officer Smith had a shotgun in his hands when Almand stepped out of the camper (M.S.F. 109). Officer Smith was standing five to ten feet behind Wilson (M.S.F. 109). Wilson had on his official uniform and had his pistol on (M.S.F. 109). He asked if Appellant would mind if they looked inside the camper and he replied "no" (M.S.F. 110).

Robert N. Smith testified: Officer Smith's testimony is almost identical with Wilson's. At the time of questioning of Petitioner, Smith was holding a shotgun and dressed in Border Patrol uniform (M.S.F. 114, 123). Counsel for Petitioner attempted to find out if at the time of questioning of Petitioner, he was free to leave the scene of the interrogation (M.S.F. 122-123). Counsel also tried to ask what would have happened if Petitioner had not opened the door of the camper for the officers (M.S.F. 122). The Court sustained objections by the Government to these questions.

Lupe Munguia testified: He owned a body shop and a mechanic shop (M.S.F. 125). He is familiar with the 1973 Chevrolet Camper Special pickup (M.S.F. 126) and with the grill on the front end of it. He stated that the way they were built, one could not tell by sticking their finger in the grill any difference between the outside temperature and the inside temperature (M.S.F. 127-128). If the camper had been there for twenty or twenty-five minutes at the time that the grill area was checked, there would have been no difference in the temperature under the grill work and the temperature in the outside environment (M.S.F. 12).

James Allan Almand testified: Around 7:00 a.m. on

the morning of January 22, 1976, Border Patrol officers knocked on his camper and he told them he would get dressed and be right out (M.S.F. 136). He was asleep at the time they knocked (M.S.F. 136). When he came out he saw Smith and Wilson and Smith had a shotgun which he was pointing at the door or at the Petitioner (M.S.F. 136). Wilson asked him his citizenship, where was he born, where he was going, where he had come from and to see his driver's license (M.S.F. 137). Wilson stated that they didn't like to shoot people (M.S.F. 137). He came out of his camper door and closed the door which self-locked (M.S.F. 137). Wilson said to open the door that he wanted to look inside (M.S.F. 138). He did not reply anything to them because he was very scared. They had a shotgun on him. He reached into his pocket pulled out the key and opened the door (M.S.F. 138). He stated that he was frightened because he had just awakened, stepped out of the door of his camper and right into the barrel of a gun (M.S.F. 138). He did not know he had a right to refuse to be searched or to have the Border Patrol go inside his pickup (M.S.F. 138). He never gave permission or consent for them to enter his camper (M.S.F. 138). He was told to open the camper so Wilson could look in after Wilson had said "we don't like to shoot people" (M.S.F. 139). He did not believe that he was free to leave whenever he wanted to (M.S.F. 139). He didn't tell the officers one way or the other that they could look inside the camper (M.S.F. 140). He saw that they were Border Patrol officers and saw Smith's badge (M.S.F. 140-141). The Border Patrol officer holding the shotgun was a very large man (M.S.F. 141). He stated that he did not know how long he had been asleep when the officers knocked on the camper (M.S.F. 143). He was trembling and

scared during his conversation with the officers (M.S.F. 146-148). He held his hands up while he was talking to the police officers (M.S.F. 148).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner objected to the stop, and seizure of the marijuana found in his camper, by a Motion to Suppress the Evidence. The two questions raised here were brought forward to the United States Court of Appeals for the Fifth Circuit in Petitioner's brief there as Specification of Error 1 and 2. In Petitioner's brief on rehearing and rehearing en banc, he re-urged these points relying upon the white horse case of *UNITED STATES vs. FRISBIE*, 550 F.2d 335 (5th Cir., 1977). The United States Court of Appeals for the Fifth Circuit denied Petitioner's contentions with Judge Wisdom dissenting on the basis of *UNITED STATES vs. FRISBIE*, supra.

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari To Consider Whether Petitioner's Fourth And Fourteenth Amendment Rights Were Violated When The Border Patrol Stopped At Petitioner's Camper, Questioned Him And Examined The Camper.

TERRY vs. OHIO, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 says there are three types of street encounters between law enforcement officers and citizens: "simple conversation," which is always permissible;

"investigatory stops" which require reasonable suspicion of criminal activity; and, "arrests" requiring probable cause. The Government and the Fifth Circuit concede that the stop which occurred in this case comes within the ambit of the Fourth Amendment protections:

> "The initial interrogation of Almand, to be legitimate, must be distinguished from the admittedly similar stop in United States v. Frisbie, 550 F.2d 335 (5th Cir. 1977). On oral argument the government conceded that Officer Wilson's intrusion constituted a stop within the scope of Frisbie and United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). That a stop under the Fourth Amendment '. . . does not mean a physical stop but rather a restraint of movement,' United States v. Robinson, 535 F.2d 881, 883 n.2 (5th Cir. 1976), is well settled. A stop occurred when Almand stepped out of the rear of the camper into the officers' presence." (Op. 1430)

The Border Patrol had no probable cause to call Petitioner out of his camper and question him at the point of a gun. No warnings were given Petitioner. He answered questions about where he had been, where he was going, how long he had been parked (Wilson and Smith disbelieved those answers). He unlocked the camper door so Wilson could "look inside." None of this sequence of events would have occurred if Wilson and Smith had left the Petitioner alone. This custodial interrogation was conducted in violation of Petitioner's Fourth Amendment protection against illegal seizure. His answers to their questions, his opening the camper door were "tainted" and the subsequent seizure of marijuana should be suppressed. *Cf.*, *WONG SUN vs. UNITED STATES*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; *SIBRON vs. UNITED STATES*, 392 U.S. 40, 67-68; 88 S.Ct. 1912, 20 L.Ed.2d 917.

Petitioner does not believe the evidence shows a reasonable suspicion of criminal activity. *Cf.*, *UNITED STATES vs. BRIGNONI-PONCE*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607. This opinion is shared by Circuit Judge Wisdom, stating in his dissenting opinion:

> "I cannot see a meaningful distinction between the stop in this case and the stop in Frisbie. As I read Frisbie, the law in this circuit compels us to hold that the stop of the Almand vehicle was unlawful; the marijuana seized after the stop should not have been received in evidence." (Op. 1432)

The reasoning in *Brignoni-Ponce*, supra, applies to situations other than a border or its functional equivalent. This case does not involve a border or its functional equivalent. The facts which must be present before a vehicle suspected of carrying illegal aliens can be stopped are:

> "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational in-

ferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." (45 L.Ed.2d 618)

In discussing the above sentence, the Supreme Court set out eight criterion that are used in deciding whether to stop a vehicle:

(1) The characteristics of the area in which they encounter a vehicle;

(2) Its proximity to the border;

(3) The usual patterns of traffic on the particular road;

(4) Previous experience with alien traffic on the road;

(5) Recent information about illegal border crossings in the area;

(6) The driver's behavior may be relevant;

(7) Aspects of the vehicle itself such as its size;

(8) The physical characteristics of the occupants of the vehicle such as dress, haircut, and ethnic characteristics.

(45 L.Ed.2d 818-819).

Another case involving stops at traffic check points is the *UNITED STATES vs. ORTIZ*, 422 U.S. 891, 45 L.Ed.2d 623, 95 S.Ct. 2585. *Ortiz* set out six criterion that law officers used in deciding to search a car for illegal aliens:

(1) Number of persons in a vehicle;

(2) The appearance and behavior of the driver and passengers;

(3) Their inability to speak English;

(4) Responses they give to officers' questions;

(5) The nature of the vehicle;

(6) Indications that it may be heavily loaded.

(45 L.Ed.2d 629)

There is no questions in this case of the fact that Wilson got out of his bed, picked up Smith and headed toward Marathon, Texas at a high rate of speed because he suspected Petitioner's vehicle was carrying illegal aliens. In addition to Wilson's statements, this was the finding of the trial court. Wilson testified as to the sole reasons he believed the Petitioner's camper contained illegal aliens:

"Q Well, what led you to believe that you were looking for a vehicle that was loaded with illegal aliens?

A Because the radio operator had conveyed the information to me that that particular vehicle had came off of Highway 170 around by Stude Butte, all the way through the Big Bend Park and then north and up 385." (M.S.F. 72)

"Q So the only reason that you were suspicious of this car at all was because

of your sensor activation reports from Marfa, isn't that true?

A Yes, Mam. His line of travel where he had come from, the indications were —

Q You are saying he —

THE COURT: Just let him finish the answer first before you ask another question, please.

MS. SLOAN: I am sorry, Your Honor.

A The location where the vehicle had come from, in my experience in station area, the number of vehicles and people we have encountered along Highway 385, that have come all that way, the last hit was on 317. He didn't hit 319, 321. To me that indicated, and I so communicated with the radio operator, that that vehicle had stopped." (M.S.F. 88-89)

Wilson's testimony meets only one of the eight criterion, i.e. the camper's proximity to the border. One may assume that the early hour of the morning was another fact that Wilson took into consideration. However, under direct questioning, he indicated that the sole criterion was the activation of the sensors near the border. None of Wilson's testimony, taken individually or collectively, warrants a finding that Wilson had a reasonable suspicion of criminal activity at the time he was notified of Petitioner's presence on Highway 170.

Any evidence obtained as a result of the putative investigatory stop should be suppressed because the evidence was obtained in violation of the Petitioner's

4th and 14th Amendment rights under the Federal Constitution.

Not only was the Border Patrol in error in stopping at the Petitioner's camper, but they violated the Petitioner's constitutional rights in conducting more than a limited interrogation of him. *UNITED STATES vs. BRIGNONI-PONCE, supra*, delineates the type of interrogation that should have been conducted assuming any stop was permitted:

> "The intrusion is modest. The Government tells us that a stop by a roving patrol 'usually consumes no more than a minute.' Brief for United States 25. There is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside. According to the Government, '(a)ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.' " (45 L.Ed.2d 615-616)

The interrogation by Wilson and Smith of Appellant went far beyond the interrogation held permissible in the above quote. The Petitioner was an Anglo, he answered questions about his citizenship. Wilson and Smith should have gone about their business. Mr. Justice White in his concurring opinion in *UNITED STATES vs. ORTIZ*, supra, stated:

> "The entire system, however, has been notably unsuccessful in deterring or stemming this

heavy flow; and its costs, including added burdens on the courts, have been substantial. *Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment* to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country." (45 L.Ed.2d 639-640, emphasis added)

The time of day, place of the stop, and search by the Border Patrol is as similar as two separate cases could be expected to be. Both cases involve the activation of sensor devices near the border at the entrances of the Big Bend National Park. The Fifth Circuit in *Frisbie*, supra, refused to approve the stop under the following language:

"At the suppression hearing in the present case it was stipulated that the population of the two counties involved, Presicio and Brewster, totaled only 12,622 persons, that in 1975 the Big Bend National Park had 331,983 visitors, and that during the month of the search, January 1976, 34,178 persons visited the park. The sensor devices revealed the direction in which the traffic was traveling and the sparse amount of that traffic. We discern nothing to indicate that the sensor signals being received established a reasonable suspicion that the vehicles in question were transporting illegal aliens. Our approval of a stop of this nature, founded upon

dubious 'suspicious' circumstances of such slight import would result in subjecting the thousands of tourists visiting the area to unreasonable detention whenever they travel at hours when certain routes are less frequented. A decision to travel such roads at less busy hours should not be the difference — constitutionally speaking — determinative of the right of officers to stop vehicles. See Brignoni-Ponce, supra, 422 U.S. 873, 882, 95 S.Ct. 2574, 2580." (page 338)

The facts as developed in this case would allow the Border Patrol to stop any vehicle traveling in or near the Big Bend National Park at certain times of the day. The threat to the Fourth Amendment rights of the citizenry in this part of Texas cannot be condoned. It was not in *Frisbie*, supra, nor in the dissenting opinion of Circuit Judge Wisdom in this case.

PRAYER

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted in this case.

Respectfully submitted,

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RICHARD J. CLARKSON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been forwarded to Mrs. Leroy Morgan Jahn, Assistant United States Attorney, 655 East Durango Blvd., Hemisfair Plaza, San Antonio, Texas 78206 and three true and correct copies to Mr. Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530.

Dated this ____ day of May, 1978.

RICHARD J. CLARKSON

APPENDIX NO. 1

UNITED STATES of America,
Plaintiff-Appellee,

versus

James Allan ALMAND,
Defendant-Appellant.

No. 77-5064.

United States Court of Appeals,
Fifth Circuit.

Jan. 9, 1978.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge:

James A. Almand was charged with possession of 550 pounds of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). He waived trial by jury, moved unsuccessfully to suppress the seized marijuana, and was convicted and sentenced. He asserts on appeal that no reasonable grounds existed for his initial interrogation by the Border Patrol, and

that consent to the search of his parked camper was lacking. We find no merit in his contentions and affirm.

I. FACTS

Around 6:00 a.m. on January 22, 1976, a Border Patrol radio operator at the Marfa, Texas, Control Center received signals in sequence from sensor devices located on Highway 170, near Study Butte, indicating that a vehicle was proceeding northeast through Big Bend National Park toward Highway 385. The radio operator notified Border Patrolman Wilson at his home in Alpine, Texas. The location of the vehicle and the time of day indicated to Wilson a possibility of alien smuggling from the unpatrolled river area to the southwest on Highway 170, a distance of about six miles from the first sensor. Wilson telephoned his fellow officer Smith, who agreed to accompany Wilson in an investigation. The officers drove down Highway 90 at speeds in excess of 100 mph, hoping to intercept the vehicle on Highway 385 a few miles south of Marathon, Texas. By maintaining contact with the radio operator, Wilson and Smith learned that the last sensor activated, no. 317, was some 35 miles south of Marathon on Highway 385 and that the other sensors north of no. 317 had not been tripped, leading Wilson and Smith to believe the vehicle had stopped or turned off the road.

As Wilson and Smith approached the area of sensor 317, they observed a pick-up truck with overhead camper parked on the east side of the road facing south. The truck had Georgia license plates. Suspect-

ing that this was the vehicle that had been traveling north from the border area, Officer Wilson felt the engine grill, and determined that the engine was warm, although the temperature was 22°F. His suspicion confirmed, Wilson knocked on the camper door, announced he was a Border Patrol officer, and asked if anyone was inside.

After some delay Almand opened the door, stepped out with his hands up, and closed the camper door behind him. He had a black eye, a cut under one ear, and a bruise on one hand. Officer Wilson, in uniform, with his revolver in its holster, stood nearest to Almand. Officer Smith, also in uniform and carrying a shotgun, stood 10 to 15 feet behind Wilson and to his side. In spite of Almand's assertion that Smith pointed the shotgun at him, the district court found that Smith kept it pointed toward the ground.

Officer Wilson identified himself as a Border Patrol officer and asked Almand his citizenship, place of birth, and where he had been. Almand replied that he was a U.S. citizen, born in Georgia, and that he had been traveling from Midland, Texas, south toward Big Bend National Park. In response to a question by Officer Smith, Almand claimed he had been parked at that spot for slightly over two hours. Considering the warmth of the engine and the sequential sensor readings indicating that Almand's truck had been traveling north from the border, Officer Wilson testified that at this point he did not believe Almand was telling the truth. Officer Wilson asked if he was alone, and Almand answered affirmatively. Officer Wilson then asked Almand if he would mind Wilson looking inside

the camper. According to Wilson's testimony, Almand agreed. Almand claims that without saying anything, he reached into his pocket, removed the key, unlocked the camper door, and opened it. From outside, Wilson observed several gas cans in the camper and a large mound in the center aisle covered with a blanket. Wilson stepped inside the camper and found several large plastic bags under the blanket. After feeling the bags, Officer Wilson pierced the plastic revealing the presence of marijuana. He then stepped back outside the camper and arrested Almand.

II. THE STOP

The initial interrogation of Almand, to be legitimate, must be distinguished from the admittedly similar stop in *United States v. Frisbie*, 550 F.2d 335 (5th Cir. 1977).[1] On oral argument the government conceded that Officer Wilson's intrusion constituted a stop within the scope of *Frisbie* and *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). That a stop under the Fourth Amendment "... does not mean a physical stop but rather a restraint of movement," *United States v. Robinson*, 535 F.2d 881, 883 n.2 (5th Cir. 1976), is well settled. A stop occurred when Almand stepped out of the rear of the camper into the officers' presence.

Although the officers in *Frisbie* relied on signals from some of the same sensor devices that traced Almand, different circumstances supported the officers' decision to investigate in this case. The observations

1 The same District Judge who granted the motion to suppress in *Frisbie* denied the suppression motion in the instant case.

upon which the government sought to support the stop in *Frisbie* were made after the stop had begun. In that case Border Patrolman Nieto noticed that the truck was heavily loaded and that the driver was having difficulty stopping only as the truck was slowing down in response to his signal.

In the instant case Patrolman Wilson possessed considerable legitimately acquired information at the time he encountered Almand at the rear of the vehicle. In addition to sensor signals revealing the direction and sparse amount of traffic on Highway 385 at that time of day, Wilson knew that the vehicle he was investigating had stopped or turned off the highway. He was aware that sensor devices had indicated no south-bound traffic along this stretch of Highway 385 that was not accounted for. After feeling the grill of the parked vehicle, Wilson was certain that it had only recently been parked. With these facts in mind, he asked Almand the standard questions relating to citizenship and his destination and point of departure. *See Brignoni-Ponce, supra*, 422 U.S. at 881-882, 95 S.Ct. at 2580, 45 L.Ed.2d at 616-617. Almand's answers to these questions were inconsistent with the information that Wilson had gathered. Almand stated he had been parked two hours; Wilson knew the vehicle had recently been driven. Almand stated he was coming from Midland, Texas, by way of Marathon; Wilson knew that the vehicle had not come from that direction and was reasonably certain that it had come from the unpatrolled border area.[2]

2 The government summarizes the following facts which it claims are pertinent and supported by the record.

The area where the truck was parked was sparsely travelled. The trip originated near the border where the Rio Grande could be

Faced with responses that would necessarily arouse suspicion by their incongruity with the information he already possessed, Officer Wilson was authorized to investigate further. *Brignoni-Ponce, supra*, 422 U.S. at 881-882, 95 S.Ct. at 2580, 45 L.Ed.2d at 616; *United States v. Worthington*, 544 F.2d 1275, 1279-1280 (5th Cir. 1977). Nothing in *Frisbie* indicates that a law enforcement officer in these circumstances should curtail his inquiry.

III. THE SEARCH

For the search of the camper to be lawful, Almand's consent must be shown, as no probable cause existed when Wilson asked Almand to open the camper door. *Cf. United States v. McCann*, 465 F.2d 147, 159 (5th Cir. 1972), *cert. denied sub nom., Kelly v. United States*, 412 U.S. 927, 93 S.Ct. 2747, 37 L.Ed.2d 154 (1973). The district court, faced with conflicting testimony on the consent issue, rejected Almand's testimony where it diverged from the officers', because Almand became nervous and his testimony lost spontaneity and was self-contradictory and inconsistent. The district court found that Officer Smith did not point his shotgun at Almand and that Officer Wilson did not say to him "We don't like to shoot people." While the testimony of officers Wilson and Smith was not exactly identical, the district court found that, in response to Wilson's request to look inside the camper, Almand silently reached into his pocket, removed the key, and unlocked and opened the camper door. Based on these facts,

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crossed on foot or by vehicle. The parked truck was observed early in the morning in an area where vehicles do not usually park. The defendant refused to respond when first asked to open the door. This was the only vehicle to activate the sensors since midnight.

the district court determined that consent was, in fact, freely and voluntarily given.

Almand testified that he did not know he had the right to refuse the officers' request to search his camper. The district court deemed that fact immaterial. Under *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 36 L.Ed.2d 854, 862 (1973), the absence of proof that the defendant knew he could withhold his consent, though a factor for consideration, is not of controlling significance in determining the voluntariness of consent. The district court found that the search of Almand's camper was conducted pursuant to Almand's voluntary waiver of his Fourth Amendment right. On the record before us, this decision must stand. *See United States v. Watson*, 423 U.S. 411, 424-425, 96 S.Ct. 820, 46 L.Ed.2d 598, 609-610 (1976).

Almand contends that Officer Wilson acted unreasonably in searching the covered plastic bags because they were not likely to contain illegal aliens. Courts have, for instance, suppressed the fruits of searches for aliens under automobile seats, *United States v. Winer*, 294 F.Supp. 731 (W.D.Tex.1969); in jacket pockets, *Roa Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969); and between the trunk panel and inside wall of an automobile, *Valenzuela-Garcia v. United States*, 425 F.2d 1170 (9th Cir. 1970). In the circumstances of this case, however, Officer Wilson acted reasonably in investigating further the 550 pound mass occupying the center of the floor of Almand's camper truck. He felt the contents of the bags before he opened them and suggested that he concluded that they did contain contraband. The officer

had many years of experience as a Border Patrol officer.

Judgment AFFIRMED.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent. In this case, as in *United States v. Villarreal and Martinez*, 5 Cir. 1977, slip opinion at 1435, ____ F.2d ____ [No. 77-5079], the majority, in effect, overrules *United States v. Frisbie*, 5 Cir. 1977, 550 F.2d 335. I cannot see a meaningful distinction between the stop in this case and the stop in *Frisbie*. As I read *Frisbie*, the law in this circuit compels us to hold that the stop of the Almand vehicle was unlawful; the marijuana seized after the stop should not have been received in evidence.[1]

The majority concedes that the stop in this case is similar to the stop in *Frisbie*. Both stops took place in the vicinity of Big Bend National Park between six and seven in the morning; Frisbie was stopped on Highway 118 leading to Highway 90 and Almand was stopped on a nearby parallel road, Highway 385, also leading to Highway 90. Frisbie and Almand triggered some of the same sensor devices. The sensors first

1 The majority notes that the same district judge who excluded the evidence in *Frisbie* admitted the evidence in this case. This does not mean that the trial judge saw a distinction between the two stops. In fact, the *Frisbie* Court reversed the trial judge's conclusion that the initial stop was legal. The *Frisbie* panel was able to affirm because the trial judge refused to admit the evidence for the different reason that questioning after the stop exceeded permissible bounds. The lower court's decision about the legality of the stop was the same in *Frisbie* as it was in this case. I would reach the same result as the *Frisbie* panel: the trial court erred.

picked up both cars near the border on the western edge of Big Bend Park.

The factors considered by the *Frisbie* panel were similar to those the government relied upon in this case:

> the direction the vehicle was traveling, the likelihood that the vehicle was coming from an unpatrolled river area, . . . the sparsely populated area where the stop occurred, [the Border Patrolman's] knowledge that local traffic did not normally travel the roads in question at such early hours of the morning and that the route in question was frequently traveled by persons transporting illegal aliens and contraband, with such activity taking place primarily in the late evening and early morning hours.[2]

550 F.2d at 337.

Frisbie also included an important factor that makes the facts in this case stronger for the defendant than the facts in *Frisbie*. Frisbie's truck appeared to be traveling in a convoy with two other vehicles. 550 F.2d at 336-37. This association of vehicles might have been interpreted as a "lead car-load car" convoy. We have held that two cars in proximity on a sparsely traveled road "may understandably raise the officer's

2 The *Frisbie* Court also mentioned the government's argument that Frisbie had difficulty stopping his truck. The panel refused to consider this factor because the Patrolmen learned this fact *after* the stop began.

suspicions". *United States v. Barnard*, 5 Cir. 1977, 553 F.2d 389, 392.[3]

None of these circumstances impressed the *Frisbie* panel. Instead, the Court agreed unanimously that it could not approve a stop "founded upon dubious 'suspicious' circumstances of such slight import" particularly in an area visited by many tourists. 550 F.2d at 338. *See also United States v. Escamilla*, 5 Cir. 1977, 560 F.2d 1229, at 1232.

According to the majority, the Border Patrolmen possessed more legitimately acquired information than their colleagues in *Frisbie*. In particular, the majority notes (1) that Patrolman Wilson knew from the sensor signals that the vehicle he was investigating had stopped or turned off the highway; (2) that Wilson was aware, again from the sensor signals, that there had been no unexplained southbound traffic at the point where he found Almand's truck pointing south; and (3) that the Patrolmen knew the truck had been recently stopped because its grill was still warm.[4]

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3 Such an observation does not, in itself, justify a stop. *United States v. Barnard*, 553 F.2d at 392. The *Frisbie* Court did not discuss the potential significance of the three vehicle convoy in raising sufficient suspicion for a stop.

4 The majority also mentions, without comment, several facts that the government argues are pertinent. These facts are very similar to those found insufficient in *Frisbie*. Frisbie, unlike Almand, was driving his truck when the Border Patrol made its stop. Therefore, only Almand "refused to respond when first asked to open the door". A delay in responding to a knock at a camper door in the early morning when the occupant may be asleep can hardly be described as a suspicious circumstance. Moreover, it is clear that by the time the patrolmen were knocking on Almand's door they had already decided to make the stop.

None of these circumstances is inherently suspicious or an indication of smuggling activity. In a national park area it is not unusual for tourists to drive campers, or to pull over to the side of the road for a map. Indeed, a smuggler might be expected to continue his trip north rather than to stop by the roadside. The only consequence of the additional information listed by the majority is to make clearer that Almand's truck was the vehicle that had passed over the sensors.

This knowledge does not distinguish *Frisbie*. There was no doubt that Frisbie's car was the one that had tripped the sensors. *See generally* 550 F.2d at 336-38. Uncertainty whether Frisbie's vehicle had triggered the sensors was not a factor in the Court's decision that there was no reasonable suspicion that he was doing something illegal.

The majority points out that Almand's answers to the Border Patrol's questions were inconsistent with the other information gathered by the officers. Although this factor is included in the section of the opinion discussing the legality of the original stop, it relates only to justifying the expanded questioning that took place *after* the stop. The majority holds that the stop began when Almand stepped out of the rear of his camper. The questioning occurred after this event. "An observation made after and caused by a stop cannot be bootstrapped into grounds for reasonable suspicion warranting the stop." *United States v. Frisbie*, 550 F.2d at 338.

Because I believe the original stop was illegal, I would exclude the evidence discovered during the

search of the truck. Even if one assumes that Almand consented to the search, and that the patrolmen acted reasonably, the consent and the evidence are fruits of the poisonous tree, and should be suppressed.

It is easy to find that one border search differs slightly from another. But *Frisbie* and *Almand* are as alike as peas in a pod. If the majority of the members of the full court think that *Frisbie* was wrongly decided, the court en banc can correct the error. Until that happens, I cannot accept bypassing *Frisbie* by resorting to inconsequential factual differences intended to distinguish the facts in *Frisbie* from the facts in the case before us.

APPENDIX NO. 2

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

March 13, 1978

TO ALL PARTIES LISTED BELOW:

NOS. 77-5064 & 77-5079 — U.S.A. v. JAMES ALLAN ALMAND, U.S.A. v. JESUS YBARRA VILLARREAL and ABUNDIO HERNANDEZ MARTINEZ

Dear Counsel:

This is to advise that an order has this day been entered denying the petitions for rehearing on behalf of the appellants, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petitions for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ BRENDA M. HAUCK
Deputy Clerk

bmh

cc: Messrs. Warren Burnett
Richard J. Clarkson
Ms. LeRoy Morgan Jahn
Mr. Richard C. Abalos
Mr. Gerald R. Lopez

APPENDIX NO. 3

SUPREME COURT OF THE UNITED STATES

No. A-838

JAMES ALLEN ALMAND,
Petitioner,

versus

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 12, 1978.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 5th
day of April, 1978.

No. 77-1610

FILED

JUL 26 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES ALLAN ALMAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General,

SIDNEY M. GLAZER,
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Washington, D.C. 20530.

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No. 77-1610

JAMES ALLAN ALMAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 565 F. 2d 927.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1978. A petition for rehearing and rehearing en banc was denied on March 13, 1978 (Pet. App. 12a).[1] Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to May 12, 1978 and the petition was filed on May 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioner filed his petition for rehearing jointly with Jesus Villareal and Abundio Martinez, who presented similar issues and whose petition for a writ of certiorari is pending (No. 77-6758).

QUESTIONS PRESENTED

1. Whether petitioner's encounter with Border Patrol officers constituted a seizure within the meaning of the Fourth Amendment, and, if so, whether the officer's actions were supported by reasonable suspicion.

STATEMENT

Following a jury-waived trial in the United States District Court for the Western District of Texas, petitioner Almand was convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, to be followed by a five-year special parole term. The court of appeals affirmed, one judge dissenting (Pet. App. 1a-12a).

The evidence adduced at petitioner's suppression hearing established that at about 6:00 a.m. on January 22, 1976, a Border Patrol radio operator in Marfa, Texas, received a series of signals from sensor devices located along highways in the area indicating that a vehicle was traveling east on Highway 170 and then north through Big Bend National Park on Highway 385 (S. Tr. 12-14). The first group of sensors activated was located about seven miles from the Rio Grande River in a sparsely populated, unpatrolled area (S. Tr. 39, 20-21, 64). No other northbound traffic had been indicated since midnight (S. Tr. 22-24). The radio operator notified Border Patrolman Wilson in Alpine, Texas, who, suspecting the possibility of alien smuggling[2], set out with another officer to investigate (S. Tr. 50, 72). As the two officers were driving south between Marathon, Texas, and

[2]Another officer testified at the hearing that 288 illegal aliens were apprehended in the same general area between September 1 and December 31, 1975 (S. Tr. 27).

the northern entrance to the National Park, they were notified by the radio operator that the last sensor activated, No. 317, was about 35 miles south of Marathon and that the sensors north of that point had not been activated, indicating that the vehicle had stopped or turned off the road (S. Tr. 50).

As the patrolmen approached the area of sensor No. 317, they saw a camper truck with Georgia license plates parked on the east side of the road facing south (S. Tr. 55). They saw no one in the cab, but Officer Wilson felt the front grill of the truck, found that it was warm despite the 22° F. outside temperature, and concluded that the vehicle had very recently been driven (S. Tr. 56, 57). Believing that this was the vehicle that had been traveling north from the border area (since no sensors north of that point had recently been activated), Officer Wilson knocked on the back door of the camper (S. Tr. 57). After several minutes petitioner opened the door and stepped out. The officers observed that he had a black eye, a large bruise on one hand and a cut under one ear (S. Tr. 58, 59). The officers identified themselves, asked petitioner where he was from and where he was going, and generally engaged in "small talk about the chilly weather and sunrise" (S. Tr. 59). In response, petitioner told the officers that he had been born in Georgia, was travelling south from Midland, Texas, and had been parked in that spot for about two hours (S. Tr. 59-60). The officer then asked petitioner if he would mind if the officers looked inside the camper (S. Tr. 60). Officer Wilson testified that petitioner said "no" and that when Officer Wilson discovered the door to be locked, petitioner took his key from his pocket and opened the door (S. Tr. 60-61). Officer Wilson entered the camper and saw a large mound in the center of the floor covered with a blanket. He removed the blanket and saw several large plastic bags. He testified that the bags "felt familiar

to me, so I pierced the plastic" (S. Tr. 61). Officer Wilson detected an ordor of marijuana, and arrested petitioner (S. Tr. 61).

Although petitioner testified that he did not consent to the search of the camper and that he unlocked it at gun point (S. Tr. 138), the district court specifically discredited his testimony "where it diverged from the officers', because Almand became nervous and his testimony lost spontaneity and was self-contradictory and inconsistent" (Pet. App. 6a).

The district court denied the suppression motion, and the court of appeals affirmed (Pet. App. 1a-8a). Although the court held that the encounter constituted an investigatory stop "when Almand stepped out of the rear of the camper into the officers' presence" (*id.* at 4a), it held that the stop was based on reasonable suspicion (*id.* at 6a). The court also affirmed the district court's finding that petitioner consented to the subsequent search of his camper (*id.* at 6a-8a).

ARGUMENT

The courts below correctly denied the motion to suppress because (1) the encounter was not a stop, and (2) even if it was a stop, it was supported by reasonable suspicion.

1. Not every encounter between the police and a citizen is a stop or an arrest. As the Court said in *Terry* v. *Ohio*, 392 U.S. 1, 19, n. 16:

> Obviously, not all personal intercourse between policemen and citizens involve "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we concluded that a "seizure" has occurred.

And under principles recently reaffirmed in *Scott* v. *United States*, No. 76-6767, decided May 15, 1978, slip op. 8-9, the determination whether there has been a stop or arrest does not turn on the subjective purposes of the officers or the subjective apprehensions of the citizen, but upon objective circumstances that would lead a reasonable man to conclude that his liberty was being restrained in a significant manner. See also *Lowe* v. *United States*, 407 F. 2d 1391, 1397 (C.A. 9); *Fuller* v. *United States*, 407 F. 2d 1199, 1208, n. 11 (C.A. D.C.), certiorari denied, 393 U.S. 1120).[3] All that the record establishes in this case is that the officers knocked on the door of a vehicle parked by the side of the road and subsequently engaged the occupant in ordinary conversation. To hold that this kind of enounter is a "seizure" requiring reasonable suspicion of criminal activity would come close to holding that every police-citizen encounter is a "seizure," and erroneously suggests that it is inappropriate for the police simply to check out an apparently empty vehicle parked in a remote area if they have no specific suspicion of criminal activity.[4]

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[3]There is no testimony in the record indicating what the officers might have done if petitioner had attempted to depart, and the foregoing authorities establish that such testimony would not be controlling in any event.

Of course whenever a policeman encounters a citizen and engages him in conversation, ordinary standards of conduct and courtesy would usually inhibit the person from ignoring the policeman and proceeding on his way. But that kind of inhibition is clearly not what this Court meant in *Terry* by a "restrain[t] [on] the liberty of a citizen" sufficient to constitute a Fourth Amendment seizure; otherwise almost every police-citizen encounter would be a seizure.

[4]Of course, there may be circumstances in which the questioning of a person who was in a parked vehicle would amount to a seizure if, for example, he was ordered to exit from the vehicle at gun point. But the district court specifically credited the officers' testimony concerning the encounter in this case.

b. Even if this encounter rises to the level of a stop, it was not unlawful. In *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885, n. 10, this Court held that whether border patrol agents are justified in stopping a car depends "on the totality of the particular circumstances" and identified a number of illustrative but not exclusive factors bearing on that issue, including (422 U.S. at 884-885): "the characteristics of the area," "[i]ts proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic," "information about recent illegal border crossings in the area," "[t]he driver's behavior," and "[a]spects of the vehicle."

All of these considerations justified the officers' limited actions in this case. To reiterate, the officers knew that there was only one vehicle travelling north at that early morning hour, which, in their experience, was a "prime time" for illegal alien traffic (S. Tr. 39); that it was travelling in a sparsely populated area in which almost 300 illegal aliens had been arrested in the preceding four months; that the vehicle had come from very close to the Mexican border; and that it had stopped or turned off Highway 385 north of sensor 317. North of sensor 317 they encountered a parked camper whose engine was still warm; it was facing south, although no sensor activity had indicated recent southbound traffic in that vicinity (S. Tr. 15, 23, 40-41). In sum, the court of appeals correctly held that the "totality of the particular circumstances" supported the stop in this case, if it was a stop, and that finding does not warrant this Court's review.[5]

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[5]Contrary to Judge Wisdom's view in dissent (Pet. App. 8a-12a), the majority below correctly distinguished the earlier decision in *United States* v. *Frisbie*, 550 F. 2d 335 (C.A. 5). First, the officers in *Frisbie* stopped a moving vehicle. Even if the encounter in this case is deemed to be a stop, the intrusion is significantly less than in the case of the stop in *Frisbie*. As this Court recognized in *Terry*, the grounds necessary to justify an intrusion vary with the degree of intrusion (see 392 U.S. 13-20); this view is inherent in the Fourth Amendment's standard of reasonableness. Second, the vehicle in this case was parked facing south, although the officers had reason to believe the only car on the road was travelling north. It was not unreasonable for the agents to find that circumstance suspicious. In any event, alleged intra-circuit conflicts are matters for the court of appeals itself to resolve. *Wisniewski* v. *United States*, 353 U.S. 901.

CONCLUSION

The petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

SIDNEY M. GLAZER,
KATHLEEN FELTON,
Attorneys.

JULY 1978.

Petitioner does not challenge the lower courts' finding that he voluntarily consented to the subsequent search of his camper. His arguments imply that the search was a fruit of the allegedly illegal stop notwithstanding his consent to the search. Therefore if the Court agrees with our contention that the antecedent encounter was not illegal, there would be no occasion to consider the consent issue.

We submit that even if the antecedent encounter were regarded as a stop without founded suspicion, the record establishes a consent sufficient to dissipate the taint under principles established in cases such as *Brown* v. *Illinois*, 422 U.S. 590 and *Wong Sun* v. *United States*, 371 U.S. 471. See also *United States* v. *Watson*, 423 U.S. 411, 425 (Powell, J., concurring). The encounter and consent in this case are very similar to the encounter and consent held to be valid in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 220. *Schneckloth* involved no antecedent illegality, and thus no fruits question, and *Brown* v. *Illinois* would suggest that consent alone would not dissipate the taint of a prior illegality. But here the antecedent encounter, if it was unlawful, was so only in the most technical sense: certainly the misconduct, if any, was hardly "purposeful or flagrant" (see 422 U.S. at 604), and any illegality involved cannot reasonably be regarded as having affected petitioner's decision to permit the inspection of his vehicle.

DOJ-1978-07